IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 06.12.2007

CORAM:

The Honourable Mr.Justice S.TAMILVANAN

A.S.No.409 of 1996

1. United India Insurance Co. Ltd.
   Rep. By Divisional Manager
   Ranipet.

2.Chemidye Manufacturing Co. P. Ltd.,
  Ranipet formerly known as
  Chemidye Trading Co. Ltd.,
  by power of attorney and subrogee
  M/s.United India Insurance Co. Ltd.
  Rep. By its Divisional Manager,
  Ranipet ... Plaintiffs/Appellants

-vs-

Assam Bengal Roadways Ltd.,
Madras rep. By its
Regional Manager ... Defendant/Respondent

This appeal is filed under Section 96 order 41 Rule (1) C.P.C. against the judgment and decree dated 28.04.1995 in O.S.No.9 of 1991 on the file of Subordinate Judge, Ranipet.

For Appellants : Mr.G.Guruswami Nathan
For Respondent : No Appearance

JUDGMENT

This appeal has been preferred against the judgment and decree dated 28.04.1995 passed in O.S.No.9 of 1991 on the file of Subordinate Judge, Ranipet.

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2.The brief facts of the case are as follows:

The appellants herein were the plaintiffs in the suit, before the trial Court. The second appellant herein had entrusted a consignment of 50 barrels of DIOCTYL MALEATE, Chemicals, weighing 10 metric tonnes, with the respondent herein for safe carriage by road, from Ranipet to Bombay to deliver the same to M/s.PDI Chemicals Pvt. Ltd., at Bombay. The respondent herein had accepted the consignment for safe

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carriage and issued Goods Consignment Note dated 30.12.1988, which is marked as Ex.A2. The second appellant had also insured the consignment with the first appellant/United India Insurance Company Limited against the loss/damage in transit. A copy of the policy dated 09.05.1988 was marked as Ex.A1. The aforesaid consignment was carried by the respondent in the truck bearing registration No.MWU 5188, which met with an accident at Gobachatram near Hosur, en route from Ranipet to Bombay. As a result of which, there was damage and shortage in the consignment for which the respondent had issued shortage/damage certificate dated 10.01.1989 which is marked as Ex.A7.

3.According to the second appellant, as per his pleadings, out of the said consignment, 13 barrels were totally damaged, six barrels were in leaking condition and as such there was a shortage/damage, and the loss was assessed to the tune of 3169/-Kgs. of chemicals and a licensed surveyor assessed the loss at Rs.1,97,816.15 by his report.

4.On the above averments the appellants herein had filed the suit against the respondent, seeking damages to the tune of Rs.1,81,205/-, On the side of the appellants/plaintiffs, apart from examining P.Ws.1 and 2, documents, Exs.A.1 to A.14 were marked and on the side of the respondent/defendant no witness was examined and no documents were marked.

5.The trial Court, considering the facts and circumstances of the case, and also the evidence, held that the appellants/plaintiffs have not established their claim and accordingly dismissed the suit with costs, aggrieved by which this appeal has been preferred by the plaintiffs.

6.The points that arose for consideration in this appeal are:

> "Whether the appellants have established the negligence on the part of the public carrier respondent/defendant?
>
> (ii)Whether the first appellant is entitled to the damages as prayed for in the suit?

7.Mr.G.Guruswami Nathan, learned counsel appearing for the appellants, would contend that the trial Court, without considering the case on merits, has dismissed the suit solely on the ground that the consignment had been sent at owner's risk. According to the learned counsel for the appellant, the

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accident had occurred near by Krishnagiri, within the State of Tamil Nadu, only due to the negligence on the part of the respondent. He has further submitted that as per Section 9 of the Carriers Act, 1865, in case of non-delivery of the consignment sent through common carrier, when the loss or damage is established, it shall not be necessary for the plaintiff, to prove that such a loss, damage or non-delivery was owing to the negligence or criminal act of the carrier. According to the learned counsel for the appellant, the burden is upon the respondent/carrier to establish that the damage was not caused due to their negligence.

8.The learned counsel appearing for the appellant further submits that though the consignment was sent at owner's risk, the public carrier is liable to pay damages to the appellant, since the damage was caused due to the negligence of the public carrier and it's officials. In support of his contention, he relied on the following decisions:

Patel Roadways Ltd. vs. Seshasayee Industries Limited reported in (2004(4) CTC 273), United India Insurance Co. Ltd., and another vs. Economic Roadways Corporation in (2001 (1)L.W. 301) and Thiruppathi Venkatachalapathy Lorry Service vs. The New India Assurance Company Ltd., Madurai reported in (1988(1) L.W.327.

9.It is seen from the impugned judgment that the reason assigned by the Court below, for dismissing the suit is that as the consignment was being sent at owners risk and as per the findings the accident had occurred in an unavoidable circumstances, and hence the public carrier was not liable to pay any damages to the appellants. Further, statutory notice required under Section 10 of the Carriers Act was not given and therefore, the appellants are not entitled to claim any damages from the respondent. Before the Trial Court, the respondents had also raised the defence, that the suit claim was barred by limitation but the same was negatived by the Court below.

10. As per Section 9 of the Carrier Act, 1865 the consignor who seeks damages from a common carrier for loss, damage or non-delivery of the goods will have to prove that the damage was occurred due to the negligence or criminal act of the carrier, provided such carrier is a common carrier. Similarly a common carrier, who did not adduce any evidence to establish that there was no negligence, for the loss/damage sustained by the consignor, cannot be permitted to raise such a plea in the first appeal. Here in the instant case, though the respondent/defendant had filed the written statement denying the negligence on the part of the respondent, no oral or documentary evidence was adduced to establish that there

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was no negligence on the part of the carrier. Further, in this appeal though service of notice on the respondents was effected, continuously there was no representation on behalf of the respondent. However, the appeal is disposed of only on merits.

11.The consignment note issued by the respondent herein, and marked as Ex.A.2 is in the printed format, wherein, "OR/CR's" has been printed and out of which "CR" has been deleted. As contended by the learned counsel for the appellant, mere scoring out the word 'CR' would not be sufficient to exempt the respondent from the liability. As per Section 9 of the Carrier Act, 1865, since it has been admitted that there was damage and non-delivery of the consignment entrusted with the respondent, the appellant plaintiff being the consignor need not prove that such damage or non-delivery was owing to the negligence of carrier. The burden is upon the respondent carrier and if there was any damage or loss caused beyond control of the carrier such as vis major, known as the Act of God, the carrier would not be liable for such a loss or damage. But, in the instant case, there is no evidence to show that the accident had taken place due to vis major or the Act of God. Further as per Ex.A7 dated 10.01.1989, the respondent has admitted that at the time of delivery 13 barrels were found empty and 6 barrels were in a leaking condition, due to the accident and as such, the total loss was estimated at 3169Kgs., of chemicals. The appellants have pleaded that the accident had taken place only due to the negligence of the respondent carrier which caused partial loss of the consignment. As the consignor has pleaded and adduced evidence that loss of consignment had occurred only due to the negligence of the carrier, on account of non-delivery of the consignment, being a public carrier, as per Section 9 of the Carriers Act, 1865, it has to be legally presumed that the loss or damage, or non-delivery of the goods had occurred only due to the negligence of the public carrier, the respondent herein.

12. The Trial Court has held that no statutory notice, as contemplated under Section 10 of the Carriers Act, 1865, was issued. Section 10 of the Carriers Act, 1865, reads as follows:

> "No suit shall be instituted against a common carrier for the loss of, or injury to, [goods (including container, pallet, or similar article of transport used to consolidate goods) entrusted] to him for carriage, unless notice in writing of the loss or injury has been given to him before the institution of the suit and within

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six months of the time when the loss or injury first came to the knowledge of the plaintiff."

13.As contended by the learned counsel for the appellant it is seen that Ex.A5, notice dated 11.01.1989, had been sent to the respondent and the postal acknowledgment has also been marked as Ex.A6. Therefore, it is clear that the second appellant had sent, statutory notice as contemplated under Section 10 of the Carriers Act, 1865, to the respondent. As per the evidence available on record, it is clear that the second appellant, being the consignor/owner of the goods is entitled to claim damages from the public carrier, the respondent herein. It is not in dispute that the second appellant had insured the consignment with the first appellant, United India Insurance Company Ltd., and that the second appellant had received the amount as damages, from the first appellant and also executed a letter of subrogation, in favour of the first appellant and therefore, the first appellant is legally entitled to maintain the claim as against the respondent, by way of filing a suit. The case of the appellants, for consideration in this is with regard to quantum of damages claimed by the appellants. Learned counsel appearing for the appellants would contend that a licensed surveyor Mr.M.G.Baskar was appointed to assess the quantum of actual damage caused to the second appellant. He was also examined as P.W.2 before the Trial Court and according to him, he assessed partial damage of the consignment of 3169Kg. of chemicals valued at Rs.1,91,360/-. As per the evidence of P.W.1, the Assistant Administrative Officer of the first appellant, a total sum of Rs.1,97,860/- had been paid by the first appellant to the second appellant, towards the policy.

14.According to P.W.2, Surveyor, he submitted his reports Ex.A.11 and Ex.A12, respectively on 24.01.1989 and 07.02.1989 respectively. He has admitted that there was no evidence to show that he had gone to the godown of the respondent on 06.10.1989 and assessed the value of damage there. Even for the alleged inspection as admitted by him no signature was obtained from the agent or representative of the respondent and no notice was given by the surveyor about the alleged inspection. He has further stated in the cross examination, that he could not say what was the chemical available in the barrels inspected by him. According to him, the damage was assessed by him not on the basis of its market value, but only on the basis of the invoice. As per the invoice, 10 metric tonnes of chemicals was sold for Rs.4,75,000/- + Excise duty 50% @ Rs.71,250/- Special Excise at 5% Rs.3,562/- with CST 4% @ Rs.21,992.50 and accordingly the total value of the consignment was Rs.5,71,805/- and therefore for the shortage/loss 3169Kg. Chemicals, he could have computed the

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value only at Rs.1,81,205/- and not at Rs.1,91,360/- as stated by the surveyor.

15.Though P.W.2 was a licensed surveyor and the alleged negligence has been established as against the carrier, in view of Section 9 of the Carriers Act. However, being the claimants, it is also the duty of the appellants to establish the value of the loss or damage sustained due to the negligence of the carrier, the respondent herein.

16.It has been established by the appellants by way of marking the invoice Ex.A3 that the total value of the consignment viz 10 metric tones of chemicals was Rs.5,71,805/- inclusive of all taxes and the same had been sent through the respondent public carrier to Bombay. Similarly as per Ex.A7 shortage/damage certificate, dated 10.01.1989, the respondent has admitted that 13 barrels were found empty; six barrels were in a leaking condition and due to the accident, the total loss sustained was 3169Kgs. of chemicals and therefore on the value of the consignment as per the invoice Ex.A3 and the shortage/damage Ex.A7, could be assessed at Rs.1,81,205/-. As the appellants herein, have established that the loss had occurred only due to the negligence of the respondent, public carrier, they are entitled to get back the amount as damages with interest and costs. The Court below has not considered the legal aspect of burden of proof, as per Section 9 of the carriers Act, 1865 and also Section 10 of the said Act.

Section 10 of the Carriers Act reads as follows:

> "No Suit shall be instituted against a common carrier for the loss of, or injury to, [goods (including container, pallet, or similar article of transport used to consolidate goods) entrusted] to him for carriage, unless notice in writing of the loss or injury has been given to him before the institution of the suit and within six months of the time when the loss or injury first came to the knowledge of the plaintiff."

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17.It is seen that even in plaint the appellants have claimed only Rs.1,81,205/- as compensation, to be paid with future interest and costs. Considering the relevant provisions of the Carriers Act and the evidence available on record, this Court is of the view that this appeal has to be allowed in part and the impugned judgment and decree are to be set aside, directing the respondent herein to pay damages on the basis of

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the evidence available on record. The points for consideration is answered accordingly.

18.In the result, this appeal is partly allowed and the impugned judgment and decree passed by the Court below are set aside and the respondent herein is directed to pay Rs.1,81,205/- to first appellant herein United India Insurance Company Ltd., as damages with 6% interest from the date of filing of the suit. No costs.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

Smi

To,

1. The Subordinate Judge, Namakkal.

2.The Record Keeper,
V.R.Section, High Court,Madras

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MRD[CO]
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